In the Supreme Court of the United States.

OCTOBER TERM, 1908.

AMERICAN EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 405.

NATIONAL EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 406.

UNITED STATES EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 407.

WELLS, FARGO & COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 408.

ADAMS EXPRESS COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 409.

ON APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SEVENTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

These cases were instituted in accordance with the provisions of section 3 of the Elkins Act of February 19, 1903, providing for the presentation of petitions

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to the United States Circuit Court to enforce the observance of tariffs published by common carriers in accordance with the interstate commerce act and its amendments and to compel the discontinuance of departures from tariffs and discriminations forbidden by law. They are before this court pursuant to the provision in the section above referred to making applicable to cases of this nature the provisions of the expediting act of February 11, 1903.

The section under which these proceedings are instituted provides in substance that where there is reasonable ground for belief "that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law" a petition may be filed in the Circuit Court of the United States, sitting in equity, having jurisdiction; that thereupon it shall be the duty of the court to inquire summarily into the circumstances upon such notice, and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity; that upon being satisfied of the truth of the allegations, the court shall enforce an observance of the published tariffs and require a discontinuance of the discriminations by proper orders. It is further made the duty of the several district attorneys, under the direction of the Attorney-General, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings.

There is no controversy with reference to the facts involved in these cases. Each of the petitions alleges in substance that the respondent is an express company engaged in the transportation of property in interstate commerce, and is subject to the provisions of the interstate commerce act and the amendments thereto; that since the passage of the amendatory act of June 29, 1906 (the Hepburn Act), making express companies subject to the provisions of the interstate commerce law, each of the respondents pursuant to law has kept open for public inspection its printed tariffs and schedules showing the rates and charges for the transportation of property in interstate commerce, which have been established and which are in force upon its routes, and has duly filed copies of such schedules with the Interstate Commerce Commission; that since the taking effect of the amendatory act of June 29, 1906, each of the respondents, contrary to the published and filed schedules and in violation of the provisions of the interstate commerce laws, has granted the free transportation of property to:

(*a*) The officers, agents, attorneys at law, and employees (and the families of each) of said respective express companies;

(*b*) The officers and employees (and the families of each) of other express companies, and

(*c*) The officers and employees (and the families of each) of various railroads and other transportation companies.

It is further averred that the method employed by the express companies in granting this free transportation is to issue what is commonly known as a "frank," purporting on its face to entitle the holder thereof to the free transportation of property by the company issuing the same. Upon the presentation of this frank the holder is granted the free transportation of his property, in accordance with the terms of the frank. It is charged in substance that the issuing of these franks and the granting of free transportation thereunder by the express companies is a violation of a number of the provisions of the interstate commerce law; that the express companies are continuing to issue them and have announced their intention of doing so in the future, unless they are enjoined by the courts.

In the answers of each of the respondents, except that of the United States Express Company, it is admitted that these companies are common carriers subject to the provisions of the interstate commerce acts. The United States Express Company denies that it is a common carrier subject to the provisions of those acts, but upon the hearing in the lower court it was expressly stated by counsel for that respondent that this question was not to be argued and would not be pressed, and the point is waived in this court. The answers admit in substance the granting of free transportation to the classes of persons described in the petitions, and assert that what the express companies have been doing and are doing in this respect

constitutes no violation of the interstate commerce acts.

In each of the cases there was filed a stipulation of facts upon which, in connection with the pleadings, the case was heard. These stipulations describe somewhat in detail the nature of the express business in which the respective companies are engaged. It is admitted that a large portion of this express business consists in the receiving, forwarding, and delivering of packages between points in different States. The stipulations state that for many years prior to the passage of the law of June 29, 1906, a custom existed under which the express companies which are parties to this suit issued to the officers and employees, and their families, of the respective railroad companies and other carriers, cards, stamps, and pasters substantially in the form set out in the stipulation, and in return therefor the railroad companies and other carriers have issued to the respective officers and employees, and their families, of the express companies passes entitling the respective holders thereof to free transportation as passengers over the lines of the common carriers issuing them (such free transportation including in connection therewith and as incidental thereto the transportation of the passenger's baggage in limited quantities); that these express companies under this custom also exchanged with each other cards, stamps, and pasters of the same kind for their officers and employees, and their families; that it has also been the custom for these express companies to issue to their own officers,

agents, attorneys at law, employees, and their families cards, stamps, and pasters of the kind named.

The stipulations further state that upon taking effect of the act of June 29, 1906, the express companies, pursuant to the provisions of the act, duly issued and filed their schedules of rates for the transportation of property in interstate commerce. The stipulations also set forth that upon the going into effect of the act of June 29, 1906, the respective companies discontinued the issuance of free transportation except to the classes of persons above named, and issued circulars notifying their officers, agents, and employees of that fact. In the stipulation are set out copies of cards, stamps, and pasters of the different forms which the express companies are issuing and upon which they claim the right to grant the free transportation of property. It will be sufficient, for the purpose of illustration, to call attention to one of these forms. One of the forms issued by Wells, Fargo & Company is as follows:

"1907

"This frank does not cover charges on foreign S. S. lines or to the U. S. island possessions.

Wells, Fargo & Company will transport free of charge during the current year over its express line the personal packages of ———, subject to conditions endorsed hereon."

The conditions endorsed on the back are as follows:

"The free transportation hereby granted is complimentary and not transferable, and is

applicable only to personal packages of the holder, not the shipments of extra heavy weight or quantity, money, bonds, jewelry, live stock, or business consignments.

"By accepting and using this frank the respondent thereby assumes all risk of loss or damage from whatever cause to property carried under same.

"When charges are collected upon packages entitled to free transportation, the company's agent will, if requested, refund same upon presentation of the frank.

"The holder of this frank is requested to present it with shipments, when made, or if not practicable to do so to personally mark on the baggage, 'Free frank No. ——,' adding his signature. If used at any other place than the residence of the holder, the frank must be presented with the shipment."

It will be seen, therefore, that the issues are clearly drawn. Appellants do not question the jurisdiction of the court, or the propriety of the proceedings in the manner in which they have been instituted. They admit the validity of the provisions of the interstate commerce laws, and concede that they are subject to those provisions. They admit that they have put in force and published and filed, pursuant to law, their schedules in which they have fixed their rates for the transportation of property in interstate commerce, and assert that the granting of free transportation to the classes of persons mentioned in the pleadings constitutes no unlawful departure from those schedules within the meaning of the interstate com-

merce acts. The appellants concede the granting of the free transportation as charged in the petitions and insist that they intend to continue to grant this free transportation and to issue the documents entitling the respective holders to such free transportation, and claim that their acts in so doing are perfectly lawful.

The questions presented for determination, therefore, are:

First. May an express company which has established, published, and filed its schedules of rates for the transportation of property in interstate commerce issue or give free transportation for property to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law?

Second. May an express company having so established, published, and filed its schedules of rates grant transportation to the officers, agents, and employees, and their families of other express companies when the only consideration for such transportation is the receipt from those express companies of franks issued to its own officers, agents, and employees, and their families, entitling them to the free transportation of their property by the companies with whom there has been this exchange of franks, there being no definite arrangement as to the number of franks so exchanged or the quantity of property to be transported by the respective companies?

Third. May an express company having so established, published, and filed its schedules of rates

grant to the officers, agents, and employees, and their families, of railroad companies and other common carriers the transportation of their property when the only consideration for such transportation is the issuing by such railroad companies or other common carriers of passes to the officers, agents, and employees, and their families, of the express company entitling the holders thereof to the privilege of free travel over the line of the railroad company or other carrier issuing the pass, there being no agreement as to the number of franks or passes to be issued under the agreement or as to the amount of free transportation on the one hand and free travel on the other?

We understand counsel for the respondents to make two principal contentions in justification of the acts complained of by the United States. They contend, in the first place, that the free transportation of property by them under these franks was a perfectly lawful act on their part prior to the enactment of the amendatory law of June 29, 1906; that it does not fall within the scope of any of the positive prohibitions of the act as then amended, and therefore is lawful without regard to the provision of section 1 of the act relating to the issuing of passes.

They contend, in the second place, that even if the issuing of these franks were held to be a violation of some of the prohibitions of the interstate commerce law, the express companies come within the exceptions specified in the first section of the act of

June 29, 1906, with reference to the granting of passes, and have the right to issue the franks in question to the classes of persons covered by those exceptions.

On the other hand, it is the position of the United States that the granting of these franks and the transportation of property by the express companies thereunder constitutes a violation of several of the provisions of the interstate commerce act. It is claimed that in issuing these franks and that in transporting property under them the express companies are guilty of unjust discrimination within the meaning of section 2 of the act, and that they subject other shippers of property over their respective routes to undue and unreasonable prejudice and disadvantage within the meaning of section 3 of the act. It is claimed that the acts on the part of the express companies which are complained of constitute violations of section 6 of the act which provides for the establishment by carriers of schedules of rates to be charged in interstate commerce, and for the filing and publication of those schedules, and which strictly prohibits the carrier in all cases from charging a less compensation than that named in the published and filed schedules.

It is claimed by the United States that the express companies which grant these franks and transport property thereunder violate those provisions of the act of February 19, 1903 (the Elkins law), as amended June 29, 1906, which prohibit generally and in absolute terms common carriers subject to the provisions

of the act from granting any concession or discrimination whereby any property is transported in interstate commerce by any carrier subject to the provisions of the act at less than the rate named in the tariffs published and filed by such carrier or *from giving any other advantage or discrimination.*

It is further claimed by the United States that the granting of this free transportation of property which falls so clearly within the prohibitions of the interstate commerce law is not included within the exceptions in section 1 of the act as amended June 29, 1906; that those exceptions relate only to the transportation of persons and have no reference to the transportation of property, and that therefore no justification can be found for the issuing of these franks by the express companies and the transportation of property thereunder.

I.

The transportation by the express companies of property under franks as disclosed in these cases constitutes an unjust discrimination and subjects other shippers to an unreasonable prejudice within the meaning of sections 2 and 3 of the interstate commerce act.

Section 2 (24 Stat., 379) of the interstate commerce act provides:

> That if any common carrier subject to the provisions of this act shall * * * collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this act than it charges, demands,

> collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3 (24 Stat., 379, 380) provides:

> That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The term "under substantially similar circumstances and conditions" refers to the circumstances and conditions relating to the carriage of the goods and not to the person of the sender. Where the traffic is "under substantially similar circumstances and conditions" in other respects, it can not be made dissimilar within the meaning of the statute by the fact that the shipper in one case is a different person from that in another. The Interstate Commerce Commission has placed upon section 2 the following constructions:

> Without further citation of authority, the construction we give to section 2 of the act to

> regulate commerce is that where the service by the carrier subject to the act is "like and contemporaneous" for different passengers, the charge to one of a greater or less compensation than to another constitutes unjust discrimination and is unlawful, unless the charge of such greater or less compensation is allowed under the exceptions provided in section 22; and that where the traffic is "under substantially similar circumstances and conditions" in other respects, it is not rendered dissimilar within the meaning of the statute by the fact that such passengers hold unlike or, as sometimes termed, unequal official, social, or business positions, or belong to different classes as they ordinarily exist in a community, or are arbitrarily created by the carrier. (*In re Persons Free or at Reduced Rates by B. & M. R. R. Co.*, 5 Interstate Commerce Commission Reports, 69, 77, 81.)

See also *Harvey* v. *Louisville & Nashville Railroad Company* (5 Interstate Commerce Commission Reports, 153.)

In harmony with the view taken by the Interstate Commerce Commission, the Federal courts which have been called upon to pass on the question have held that the granting of free transportation constitutes an unjust discrimination and an unreasonable preference under the provisions of sections 2 and 3 of the interstate commerce act. Thus in *Ex parte Koehler* (31 Fed. Rep., 315, 321–322) Judge Deady, giving instructions to a receiver with reference to the issuing of free transportation, held that the effect

of the interstate commerce act was to prohibit the granting of free transportation except as provided in section 22 of the act. He said:

> The exception (in section 22) takes the subject of free carriage on account of any person's employment by a railway corporation out of the question of "similar circumstances and conditions" as provided in section 2, and declares that the person so employed may be carried on that account, without reference to any other circumstance or condition, and by a necessary implication no one else.

In his charge to the grand jury (66 Fed. Rep., 146, 148) Judge Morrow, interpreting sections 2 and 3 in their relation to section 22 of the interstate-commerce act and referring to the decisions of the Interstate Commerce Commission above cited, held "that the issuing of passes entitling the holder to free transportation from one State to another is, unless justified by the exceptions (in section 22), an 'unjust discrimination' which Congress intended to prevent and punish."

There is nothing in this view inconsistent with the rulings in *Interstate Commerce Commission* v. *Baltimore, etc., R. Co.*, 145 U. S., 263 (the party rate case).

In that case the holding was that the transportation of a number of persons on a single ticket was not substantially identical with the transportation of one person, and that therefore the transportation could not be said to be conducted under circumstances and conditions which were necessarily similar. It is to be observed, however, that the circumstances in

question were those relating to the nature of the carriage and not to any difference in the persons transported.

The portions of sections 2 and 3 of the interstate commerce act relating to unjust discrimination and unreasonable disadvantage were modeled from the English tariff act, and in construing them our courts have followed the interpretation of the English courts.

> *Interstate Commerce Commission* v. *Baltimore, etc., R. Co.*, 145 U. S., 263.
>
> *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S., 144.
>
> *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S., 197.

Construing similar sections of the English act, the English courts have held with great unanimity that the differences in circumstances and conditions are those relating to the carriage of goods and the nature and character of the service rendered by the shipper, not to the business motive of either the shipper or carrier.

> *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L., 226.
>
> *Denaby Main Colliery Co.* v. *Manchester Railway Co.*, 11 Appeal Cases, 97.

In the latter case Lord Chief Justice Blackburn said:

> I think it finally settled * * * that for passing over the same portion of the railway, the obligation to charge, in respect of goods

> of the same description, equally, is imposed if they are "under the same circumstances" and *that the circumstances are those relating to the carriage of goods and not to the person of the sender.*

Other English cases to the same effect are collected in the opinion of the Interstate Commerce Commission, *In re Boston & Maine R. R. Co.* (5 Interstate Commerce Commission Reports, 69, 79).

True it is that whether or not in a particular instance there is unjust discrimination or unreasonable preference is a question of fact depending upon the matters proved in each case. (*Interstate Commerce Commission* v. *B. and O. R. R. Co.*, 145 U. S., 263; *Interstate Commerce Commission* v. *Alabama Midland R. Co.*, 168 U. S., 144, 170; *Denaby Main Colliery Co.* v. *Manchester R. Co.*, *supra*.) However, the granting of free transportation to any person or class of persons when the public generally is charged a given fixed rate for the same service is of itself sufficient under the above rulings to justify a finding of unjust discrimination and unreasonable preference. It appears absolutely from the facts as stipulated in this case that the express companies are giving free service to the classes of persons described in the pleadings and are charging the general public a fixed rate which they have duly published and filed for precisely the same service. The difference in circumstances upon which the express companies rely as a justification for the discrimination is a difference

which does not go to the nature of the service rendered, but which involves the personality of the shipper only. This is the kind of discrimination which can not be justified under the sections in question, and proof that such discriminations have been granted without any difference in circumstances relating to the kind of carriage or the nature of the service rendered must lead to the finding that the discrimination is unjust and unreasonable.

To appreciate fully the force of this, it is only necessary to consider that the express companies claim the right to transport a package free for one person and to charge another the established rate for the same service, the only difference being that one of the persons happens to be a member of the family of an officer of a railroad company. The trial judge, therefore, under the admitted facts, was bound to hold that the discriminations which it was conceded were being granted were unjust and unreasonable discriminations within the meaning of the statute.

II.

The transportation of property by the express companies under franks constitutes an unlawful departure from their published and filed schedules of rates.

The provisions of the interstate commerce act require absolute and uniform adherence to the schedules of rates published and filed pursuant to the provisions of the law. Section 6 as amended by the act of June 29, 1906, after providing for

publishing and filing schedules, further provides (34 Stat. 584, 587):

> Nor shall any carrier charge or demand, or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs.

Section 1 of the Elkins Act, as amended by the act of June 29, 1906, provides among other things as follows (p. 587):

> The willful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.
> * * *
>
> Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof,

> or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act.

The requirements of these provisions are absolute. When a carrier has once established a rate pursuant to the interstate commerce act, and has published and filed it, there must be no departure from that rate in favor of any shipper.

> *Texas & Pacific Railway Co.* v. *Mugg*, 202 U. S., 242.
>
> *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U. S., 426, 445.
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> *Armour Packing Company* v. *U. S.*, 209 U. S., 56.

It is conceded in the cases at bar that the express companies have published and filed their schedules prescribing the uniform rates to be charged for the services rendered by them. Notwithstanding this, however, they maintain the right to depart from those schedules to the extent of granting free transportation to their own officers and employees and to the officers and employees of other carriers in exchange for like favors from those carriers. It is obvious that this is a violation of the plain provisions of the sections of the act above quoted. Any other conclusion is impossible under the opinions of the Supreme Court above cited, which hold that the

rates fixed in the schedules filed pursuant to the act to regulate commerce are controlling, that it is beyond the power of the carrier to depart from such rates in favor of *any* shipper, and that there is no provision excepting special contracts from the operation of the law.

III.

The granting of free transportation of property by the express companies under franks is a violation of the provision in section 1 of the Elkins Act as amended June 29, 1906, which prohibits absolutely all discriminations with respect to the transportation of property in interstate commerce by carriers subject to the act.

We have shown above that the transportation of property under these express franks constitutes an unjust discrimination within the meaning of sections 2 and 3 of the original interstate commerce act. Independent of that, however, this free transportation of property unquestionably constitutes a violation of the provision in section 1 of the Elkins Act as amended June 29, 1906, which provides (34 Stat., 584, 587):

> It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in

> the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced.

It is to be observed that the prohibition of this act is directed not at *unjust* discriminations or *unreasonable* advantages, but at discriminations and advantages of *every* kind. In the enactment of the amendatory legislation, of which the provision just above quoted is a portion, it was obviously the intention of Congress to require common carriers engaged in interstate commerce to publish and file their schedules of rates, to adhere absolutely to those schedules, and to grant no preferences or discriminations unless such preferences or discriminations were permitted by some express exception in the act. That this is the correct interpretation to be placed upon the provision in question is manifest from the difference in the language used by Congress in the original act of 1887 and in the amendatory legislation. In the original act the discriminations prohibited were unjust discriminations. The prejudices and disadvantages forbidden were undue and unreasonable prejudices and disadvantages. In the amendatory legislation the terms "unjust," "undue," and "unreasonable" are omitted and the prohibition is leveled, in general terms, against any advantage or discrimination. We can not regard this change in language as accidental. Congress was intentionally broadening the scope of the prohibitions against

the granting of advantages and discriminations with respect to the transportation of the property by common carriers subject to the act.

And the correctness of this view is conclusively established when we take into consideration the history of the interstate commerce legislation, the history of the times of which that legislation was a part, the evil which the amendatory legislation was designed to remedy, and the object which Congress had in mind in the enactment of the amendments of 1903 and 1906. Statutes like this must be interpreted in the light of the history of the legislation and the purpose of Congress.

Holy Trinity Church v. *U. S.*, 143 U. S., 457, 463.

Buttfield v. *Stranahan*, 192 U. S., 470, 475.

The original law of 1887 was passed in response to an overwhelming demand of the people that favoritism in the matter of railroad rates should end. Inequality of treatment on the part of the railroads in the matter of rates had produced evils so gigantic that the industrial stability and prosperity of the country were threatened. By reason of the power of the railroad companies to grant favors in transportation, the business of every merchant, manufacturer, and, indeed, of every community was at the mercy of the whim of some railroad manager. The legislation, however, as first enacted in 1887 was far from satisfactory. The discriminations which were prohibited were unjust discriminations; the advantages which could not be given were unreasonable advantages;

and, as a result of the juggling with these words, the force of the statute was "frittered away by niceties at war with the practical administration of justice." It was impossible to indict and convict a carrier for doing something unjust and unreasonable, when the carrier was to be the judge in the first instance of what was, in fact, unjust and unreasonable. The result was that the law in many of its practical features became a mere sham. Rebates, discriminations, and preferences were granted on every hand, sometimes through subterfuge and sometimes in open defiance of the law.

Then came a popular demand, stronger than it had been in the first instance, that the law should be amended and strengthened so as to put an end to these pernicious practices, which had been the foundation of many of the largest and most offensive monopolies, and which were again threatening the business stability of the nation. It was in furtherance of this great object that the amendatory legislation of 1903 and 1906 was passed. If we study the history of the times and the history of this legislation in Congress, there can be no doubt as to what Congress intended to accomplish. An end was to be put to legal jugglery with the words "unjust," "undue," and "unreasonable." Discriminations and advantages of every kind were to be prohibited except as those discriminations and advantages were covered by some specific exception of the law. Common carriers were to put down on paper the rates to be charged for their services in interstate commerce. Those schedules were to

be kept open to the public and were to be filed with the Interstate Commerce Commission; and once so established and filed there was to be no departure from them. The carrier was to be required to collect from every shipper the full amount of the rate as set down in the schedule for the service rendered. There was to be no opportunity left for evading the law through the subterfuge of some service rendered by the shipper to the carrier or of an exchange of services between carriers. The transportation was not to be paid for in something of uncertain value, like contracts for services, for soliciting, or for advertising. The rate was to be paid in money in accordance with the established schedule. Nothing was to be taken in exchange for transportation except that set down in the published and filed schedules. *Discriminations of all kinds were prohibited, except those falling within some specific exception in the act.*

The rules governing the interpretation to be placed upon the Elkins Act have been clearly and forcibly stated by this court in the case of *Armour Packing Co.* v. *U. S.* (209 U. S., 56, 71), as follows:

> The act seeks to reach all means and methods by which the unlawful preference of rebate, concession, or discrimination is offered, granted, given, or received. * * *
>
> This act is not only to be read in the light of the previous legislation, but the purpose which Congress evidently had in mind in the passage of the law is also to be considered.
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> The views of this court, speaking through

Mr. Justice White, in *N. Y., New Haven & Hartford R. R. Co.* v. *Interstate Commerce Commission*, 200 U. S., 361, 391, are apposite here:

"It can not be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all and to destroy favoritism, these last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial, and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. * * * The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer.'

The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published, and posted as required

by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published.

Again in the same case (page 80), the court said:

* * * one rate (is) to be charged for similar carriage of freight, and that the filed and published rate, equally known by and available to every shipper.

* * * There is no provision excepting special contracts from the operation of the law. One rate is to be charged and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

* * * the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

If the contention is true that the prohibition in the Elkins Act is directed at discriminations of all kinds, then a common carrier subject to the provisions of the interstate commerce act must, with respect to the transportation of property, charge to everybody absolutely the same rate for the same service, unless in some other section of the act there can be found an exemption which justifies the granting of the discrimination. The only section of the interstate commerce act which relates in terms to the carriage of property at free or reduced rates is section 22, as follows (25 stat. 857, 862):

> That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of soldiers' and sailors' orphan Homes, including those about to enter and those returning home after discharge under ar-

> rangements with the boards of managers of said Homes; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees.

The first part of the section above quoted refers to the transportation of property; the last portion of it expressly covers the transportation of persons. There is nothing in it which by any possible construction can be taken as covering the granting and interchanging of franks by the express companies charged in these cases.

It is true that the learned circuit judge, in interpreting the sections of the statute involved in this case, was unwilling to construe the terms "advantage" and "discrimination," as used in section 1 of the Elkins Act, to mean anything different from the terms "undue or unreasonable advantage" and "unjust discrimination," as used in sections 2 and 3 of the original interstate commerce act. He decided the case precisely as if the language of the Elkins Act had remained the same as the language of the original act, and held that the discriminations shown to have been committed by the appellants were in fact unjust discriminations. We respectfully submit, however, that in the application of the Elkins Act it is proper to recognize the obvious purpose of Congress to broaden the scope of the original interstate commerce

act. As we have pointed out before, this court in the Armour Packing Company case has stated in clear and unmistakable terms that the purpose of the Elkins Act was to require absolute adherence to established schedule and to prevent all kinds of discriminations not specifically covered by an express exception. It is a rule of statutory construction, where the legislative body has with apparent intention made such a change in the language used, that due significance must be given to the change in the application of the statute. "We are not at liberty," said Mr. Justice Strong in *Market Co.* v. *Hoffman* (101 U. S., 113, 115), "to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, section 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable times."

A few of the cases in which this elementary rule is stated and applied are as follows:

Rhodes v. *Iowa*, 170 U. S., 412, 423;
Mercantile Bank v. *New York*, 121 U. S., 138, 155;
Early v. *Doe*, 16 Howard (U. S.), 610, 616;
Allen v. *Louisiana*, 103 U. S., 80, 85;
Caha v. *U. S.*, 152 U. S., 211, 214;
U. S. v. *Stowell*, 133 U. S., 1, 13;

Heydenfeldt v. *Daney Gold, etc., Co.*, 93 U. S., 634, 640;

Postmaster General v. *Early*, 12 Wheaton (U. S.), 135, 148.

The terms "undue discrimination" and "undue or unreasonable preference or advantage," used in the original interstate commerce act, have been before Congress for consideration many times. One of the most serious defects in the law grew out of the fact that criminal prosecutions could not be based successfully upon statutes defining with such uncertainty the offense prohibited. Thus, in the cases of *C. & N. W. Railway* v. *Dey et. al*, 35 Fed. Rep., 866, 876, and *Tozer* v. *U. S.*, 52 Fed. Rep., 917, 919, Mr. Justice Brewer had held that a criminal prosecution could not be maintained under the sections of the act forbidding the charging of "unreasonable" rates or the giving of "undue" preferences. He said:

> In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable.

When it came to the passage of the Elkins Act, Congress undoubtedly had in mind these decisions of the courts which were an essential part of the history of the legislation in question, and so when Congress came to draw the provision requiring adherence to established rates and prohibiting the giving of advantages and discriminations, the words "undue," "unjust," and "unreasonable" were omit-

ted. We can not consider this fact in connection with the history of the times and the history of the particular legislation and apply the rule of statutory construction applied by this court in so many cases, to which we have above referred, without holding that the word "discrimination," as used in the Elkins Act, covers discriminations of every kind, and that in a proceeding against a carrier for granting a discrimination it is not necessary for the Government to show as a part of its case that the discrimination was an unjust one. To place any such construction upon the Elkins Act is to leave the law substantially as it was prior to the passage of that act and to deny that its obvious purpose and effect was, as pointed out by this court in the case of *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.* (204 U. S., 426, 447), to *strengthen and make more effective the provisions of the original act.*

The case of *Interstate Commerce Commission* v. *B. & O. R. R. Co.* (145 U. S., 263, 278), referred to by the learned circuit judge in his opinion in this case, only tends to strengthen the force of our position with respect to this proposition. In that case, construing sections 2 and 3 of the original act, and referring to the terms "unjust discrimination" and "undue or unreasonable preference or advantage," Mr. Justice Brown said:

> It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust. In other words,

> this section is rather illustrative than exclusive. Indeed, many, if not all, the excepted classes named in section 22 are those which, in the absence of this section, would not necessarily be held the subjects of an unjust discrimination if more favorable terms were extended to them than to ordinary passengers.

In other words, the original statute prohibiting discriminations was so drawn as to leave for determination as a question of fact in every case whether or not the discrimination was an unjust one. The Supreme Court had said that section 22 did not contain all exceptions, but that it was merely illustrative, and that there might be many other instances of discrimination which properly could be held not to be unjust. Is it not perfectly obvious, in view of this condition of the law and in view of the great difficulty of making practically effective any such indefinite statute, that Congress had some purpose in the omission of these words "undue," "unreasonable," and "unjust" from the Elkins Act, and intended to so frame the statute as to make it definite and certain and capable of practical enforcement?

IV.

The granting of free transportation of property under the franks of the express companies is not permitted by section 1 of the Interstate Commerce Act as amended June 29, 1906.

From the consideration of the sections of the statute to which we have already directed attention, it follows that appellants have no justification of the acts complained of, unless that justification is to be

found in the antipass provision of section 1 of the Hepburn Act of June 29, 1906.

Does the granting of the free transportation complained of fall within the scope of that exception?

The material portion of said section 1 (34 Stat., 584,) is as follows:

> No common carrier subject to the provisions of this act shall, after January 1, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of soldiers' and sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such Homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, post-office inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attend-

> ing any legal investigation in which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

Does the word "pass" as used in this section include the granting of free transportation of property by the express companies?

This provision of the act, in the first place, contains the general prohibition against the issuing or giving of "any interstate free ticket, free pass, or free transportation *for passengers*." Then follow the exceptions to the general prohibition and the enumeration of the classes of persons to whom free transportation as passengers may be given. That this portion of the section is limited in its scope to the transportation of passengers is obvious not only from the use of the words "for passengers," but from an examination of the exceptions to the general rule laid down in the first part of the provision. Every one of the exceptions relates to the free transportation as passengers of the class of persons named.

It is argued, however, on behalf of the respondent express companies that the *proviso*, "this provision shall not be construed to prohibit interchange of passes for the officers, agents, and employees of com-

mon carriers and their families," is broad enough to include the free transportation of property by the express companies. It is said that this is true for the reason that the word "pass," prior to the enactment of the amendatory law of June 29, 1906, was sometimes used in connection with the free carriage of property by the express companies. It appears from the exhibits on file in the case, however, that the term "pass" was not used by the express companies as a noun; that is to say, as the word designating that which entitled the holder to such free transportation. In some of the stamps, cards, and pasters the word is used as a verb, and it is said that the express company will pass over its lines the property of the holder. The word which is used to designate the instrument entitling the holder to the free transportation is "frank" and generally even where the word "pass" is used the word "frank" is employed also. For example, in one of the forms of frank issued by Wells, Fargo & Co. it is said:

> Wells, Fargo & Company will pass over its lines at owner's risk of loss or damage one package to which this *frank* is attached.

If we assume that Congress intended to give to the word "pass" the meaning in which it is ordinarily used, it is impossible to interpret the *proviso* in question so as to include the transportation of property. In Webster's Unabridged Dictionary pass is defined as follows:

> A request or order to give passage to a person; a document entitling one to pass, or to

> go and come; a passport; a ticket of free transit or free admission.

In the Century Dictionary a pass is defined as follows:

> Permission or license to pass; a permit or writing either to come or go; a ticket or writing giving one free admission or transit: As a pass to the theatre; a railway pass; also often by abbreviation a passport.

And to the same effect are the definitions in Webster's International Dictionary and the Standard Dictionary.

On the other hand, the word "frank" is ordinarily employed, as may be seen from the definition of the word in the different dictionaries, in connection with the transportation of property. If we interpret the provision in question to refer to the transportation of property, we must impute to Congress an intention to use the word "pass" quite out of its ordinary meaning.

If for the purpose of argument, however, we assume that the word "pass" as used in the *proviso* is broad enough in meaning to cover in some cases the transportation of property, still we are obliged by well-established rules of construction to confine its meaning here to the transportation of persons. As has been pointed out, that portion of the section in question which precedes the *proviso* is expressly limited in its scope to the transportation of persons. There is, first, the general prohibition against the giving of free transportation for passengers. Then follow the

exceptions to the general provisions, in connection with which the *proviso* is inserted.

It is a general rule of statutory construction that a *proviso* in a statute is intended to qualify what is affirmed by the body of the act. It takes out of the operation of the enactment what would otherwise be within it. The office of a *proviso* generally is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to acts not intended to be brought within its purview. The *proviso* must be interpreted in the light of that to which it is an exception, and must not be given a broader meaning than such prior portion, unless no other construction is possible.

Potter's Dwarris on Statutes, page 118.
2 Lewis' Sutherland on Statutory Construction, sections 351–352.
Sutton v. *People*, 145 Ills., 279, 285.
Huddleston v. *Francis*, 124 Ills., 195–198.
United States v. *Dickson*, 15 Peters, 141, 164.
Minis v. *United States*, 15 Peters, 423, 445.
Savings Bank v. *U. S.*, 19 Wallace, 227, 235.
White v. *United States*, 191 U. S., 545, 551.

In *United States* v. *Dickson* (15 Peters, 141, 163), Justice Story says:

> We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a *proviso* is afterwards introduced, that *proviso* is

> construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. *In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof.*

In *Savings Bank* v. *U. S.* (19 Wallace, 227, 235), it is said:

> It is argued, however, that savings institutions were relieved by the *proviso* to the section. That, of course, is to be construed in connection with the section of which it is a part, and it is substantially an exception. *It takes out of the operation of the body of the enactment that which otherwise would be within it. It restrains the generality of the previous provision.*

In *Sutton* v. *People* (145 Ills., 279, 285), it is said:

> It is a familiar rule of construction that "a proviso in a statute is intended to qualify what is affirmed in the body of the act, section, or paragraph preceding it."

See, also, decision of *Interstate Com. Com., In re Parmelee Company*, decided March 25, 1907.

In the case of *Sutton* v. *People*, *supra*, the rule of construction was applied to a statute penal in its nature, and the principle of construction above stated is unquestionably a general rule to be applied to all statutes.

U. S. v. *Lacher*, 134 U. S., 624, 628.

Northern Securities Company v. *U. S.*, 193 U. S., 197.

In *U. S.* v. *Lacher, supra*, it is said:

> Though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

In the same case the following from Sedgwick on Statutory and Constitutional Law, second edition, 282, was quoted with approval.

> The rule that statutes of this class are to be construed strictly, is far from being a rigid or unbending one; or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing by any mere verbal nicety, forced construction, or equitable interpretation, to exonerate parties plainly within their scope.

Applying these principles to the construction of the section in question, we find th the general provisions are limited in their subject-matter to the transportation of passengers. The *proviso* must be construed as "carving out" an exception from that which is covered by the preceding portion of the statute. The exception carved out by it, therefore, is an exception from a provision which is limited to the transportation of passengers, and, therefore,

the same limitation must be placed upon the *proviso*. It follows that this section can not be construed to warrant the granting of transportation under franks, as disclosed in the cases at bar.

The learned counsel for the appellant seems to concede the general rule to be as we have above pointed out. It is claimed, however, that in some cases the rule has not been applied and that the words following the *proviso* have been given the same construction as if they stood in an independent statute. An examination of the cases referred to, however, will show that this exception to the general rule is to be permitted only when the subject covered by the *proviso* has no relation whatever to that which precedes; it has been merely tacked on to the act by the legislature without its having any bearing whatever on the subject-matter of the act. Thus, in the case of the *Georgia Banking Co.* v. *Smith* (128 U. S., 174), Mr. Justice Field said (p. 181):

> The general purpose of a *proviso*, as is well known, is to except the clause covered by it from the general provisions of a statute or from some provisions of it, or to qualify the operation of the statute in some particular. But it is often used in other senses. It is a common practice in legislative proceedings, on the consideration of bills, for parties desirous of securing amendments to them to precede their proposed amendments with the term "*Provided*,' so as to declare that, notwithstanding existing provisions, the one thus expressed is to prevail, thus having no greater

> signification than would be attached to the conjunction "but" or "and" in the same place, and simply serving to separate or distinguish the different paragraphs or sentences. *Several illustrations are given by counsel of the use of the term in this sense showing in such cases where an amendment has been made, though the provision following after has no relation to what precedes it.*

The rule of construction for which we contend is fairly applicable to the statute in question, for the reason that by its very terms it is limited to that which precedes, viz, the free transportation of passengers. The language of the *proviso* is (34 Stat., 584, 585):

> *Provided*, That *this provision* shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation.

The *proviso* in question is a declaration by Congress of the construction which is to be placed upon that which goes before, and by no process of reasoning can its construction be extended so as to give direct permission to do something prohibited by other portions of the act and not covered by the exception which precedes it. To place upon the statute the construction contended for by counsel for appellants is to ignore one of the most elementary rules of statutory construction.

V.

The contention of appellants that the gratuitous transportation of the property in question is not commerce.

In justification of the granting of the free transportation involved in this case, it is contended that this transportation is in no way connected with trade or commerce and, therefore, it does not fall within the scope of the regulations of the interstate commerce acts. A distinction is drawn between transportation of personal packages of an employee of one of the appellant express companies, or an employee of a common carrier and the packages of other persons. Of course it must be conceded that the nature of the carriage is precisely the same. In a given case the property will be the same kind as that transported for the public generally; the points between which the transportation is conducted will be the same; every act in connection with the handling of the property will be identical with the acts performed in handling the same kind of property for the general public.

For example, one of the express companies gives to an employee of a railway company one of the franks set out in the petitions. That frank entitles the holder to the free transportation of a package in accordance with certain rules. The holder of the frank purchases goods for his personal use from a merchant in New York or Chicago and has them shipped to his home in another State and upon presentation of his frank can have the express charges upon the shipment marked paid, when in fact he has

paid no money to the express companies for the carriage. It is difficult to see how any distinction can be drawn between this situation and that of his neighbor, who buys the same kind of goods from the same place and from the same merchant and who, when the goods are delivered at his door, is required to pay the charges for the transportation specified in the schedules published and filed by the express company in accordance with the interstate commerce act. Nor is there any process of reasoning by which the transportation of the property in one case can be excluded from the category of interstate commerce while in the other it is included.

It must be borne in mind that there is nothing in the terms of any of these franks which precludes the transportation of articles purchased in the market by the holder for his personal use and transportation at the direction of the holder of the frank.

In this connection, in determining the nature of the transportation carried on under these franks, it is well to bear in mind the other side of the situation. Let us again take the case of the exchange of franks for passage. In return for the granting of the franks to the employees of a railroad company by the express company, the railroad company gives a pass to employees of the express company. That pass entitles the holder to precisely the same kind of transportation as that for which his neighbor is required to pay in dollars and cents the rate specified in the schedules published and filed by the railroad company. Can it be said that this transportation is not commerce, and

if carried on between a point in one State and a point in another is not interstate commerce?

In *Hanly* v. *Kansas City Southern Ry. Co.* (187 U. S., 617, 619) this court said:

> Transportation for others as an independent business is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

In *Adair* v. *United States* (208 U. S., 161, 176), it is said:

> Let us inquire what is commerce, the power to regulate which is given to Congress.
>
> This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons, and the transmission of messages by telegraph—indeed every species of commercial intercourse among the several States, but not to that commerce "completely internal which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States." The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed. Of course, as has been often said, Congress has a large discretion in the selection or choice of the means to be employed in the regulation of interstate commerce, and such discretion is not to be interfered with except where that

> which is done is in plain violation of the Constitution. (*Northern Securities Co.* v. *U. S.*, 193 U. S., 197, and authorities there cited.)

Certainly the transportation by an express company of a package belonging to one of its own employees or to the employee of a railway company from a point in one State to a point in another is as much interstate commerce as is the transportation of a package for any other person. It seems perfectly clear, therefore, that the transportation involved in these cases falls within the scope of the provisions of the interstate commerce acts.

VI.

The Rule of the Interstate Commerce Commission issued October 12, 1906.

Counsel for appellants have referred to the general rule issued October 12, 1906, by the Interstate Commerce Commission (12 I. C. C. Reports) as follows:

> But the Commission does not construe the law as preventing a carrier from giving the necessary free transportation to a person traveling over its line solely for the purpose of attending to the business of, or performing an act which must benefit, the carrier, nor from giving the free carriage over its line to the household and personal effects of an employee who is required to remove from one place to another at the instance of or in the interest of the carrier by which he is employed.

In attempting to invoke this ruling of the Commission, we respectfully submit that counsel has

overlooked a vital distinction growing out of the state of facts in the cases at bar. It is one thing for a carrier to transport free tools which are used by one of its employees in his work. It is an entirely different thing to transport free for that employee all property which happens to belong to him and which he desires to have carried from one place to another for his personal use. The holder of one of the franks in question is not limited in using it to transportation of property to be used in connection with the business of the express company itself, but he is entitled under it to free transportation of anything belonging to him falling within the classes of personal property named in the frank, and also to the free transportation of anything which he acquires as an article of trade or commerce for his personal use.

Can it be contended for a moment that under the terms of the franks in these cases, the holder of one of them who lives in Washington may not purchase goods in New York for his own personal use and direct that they be sent to his home in Washington by express and upon delivery have the express charges remitted by presenting his frank? The franks do not limit the right to free transportation to property to be used in connection with the express company's business or to transportation made necessary by something which has been done in connection with the conduct of the business of the carrier. The appellant express companies have made no attempt to bring themselves within the limits of

the rule of the Interstate Commerce Commission above referred to. They have made the grant of free transportation in general terms and without regard to whether the transportation is in connection with the business of the company or not.

VII.

Conclusion.

The transportation involved in these cases is transportation subject to the provisions of the interstate commerce acts. The granting of such transportation free to the classes of persons named in the petitions is unquestionably a departure from the published and filed schedules of the appellant carriers. It is not sought, however, to sustain these petitions upon that narrow ground alone. The giving of this free transportation, even though it were specified in the established schedules, is a discrimination; and the Elkins Act prohibits every kind of discrimination not expressly excepted in the act. Even under the provisions of the original act prohibiting *unjust* discriminations, the giving of this free transportation must be held, as a question of fact, to amount to an *unjust* discrimination, because the distinction drawn does not relate to the nature of the carriage, but to the person whose property is transported. The giving of this free transportation does not fall within any of the exceptions in the acts in question. It is not covered by section 22 of the original act. It is not covered by the anti-

pass provision in section 1 of the Hepburn Act. The exception there relates solely to the transportation of persons and has no application to the carriage of the property; the permission to exchange passes given in the *proviso* must be limited in its application to the subject-matter of the exception to which it in terms refers.

It is, therefore, respectfully submitted that the decrees in these cases should be affirmed.

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